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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act Of 1996	)	CC Docket No. 96-98

COMMENTS OF OPTEL, INC.

GOLDBERG, GODLES, WIENER & WRIGHT
1229 Nineteenth Street, NW
Washington, DC 20036
(202) 429-4900
Its Attorneys

Counsel:

Michael E. Katzenstein
Vice-President and General Counsel
OpTel, Inc.
1111 W. Mockingbird Lane
Dallas, TX 75247

August 27, 1999

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COMMENTS OF OPTEL, INC.

OpTel, Inc. ("OpTel"), hereby submits these comments regarding the above-referenced Notice of Proposed Rulemaking (the "NPRM").

INTRODUCTION AND SUMMARY

OpTel applauds the Commission's continuing efforts to promote the development of competition in the local exchange markets. As the Commission has come to realize, "[a]ccess by competing telecommunications service providers to customers in multiple tenant environments is critical to the successful development of competition in local telecommunications markets."[1]

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[1] NPRM ¶ 29.

Unfortunately, because many of the issues raised in the NPRM overlap with issues already raised or decided in other proceedings, many of the proposals in the NPRM, if adopted, may simply cause more confusion, litigation, and uncertainty in the market. Further, although the NPRM is targeted at barriers to entry for CLECs, several of the proposals in the NPRM would have negative implications for new entrants in the multichannel video programming distribution ("MVPD") markets.

Thus, rather than focus, as the NPRM does, on building access, the Commission should require ILECs to make the existing wiring on multiple dwelling unit ("MDU")[2] properties available to competing providers, which would improve CLEC access to MDUs without impinging on the property rights of MDU owners or impeding the development of competition in the MVPD market. Thus, and for reasons set forth below, OpTel provides the following summary of its comments on the NPRM:

- In the residential MDU market, the most significant barrier to entry is not the MDU owners, which for the most part seek to provide their residents with high-quality telecommunications services at competitive prices, but the ILECs, which resist providing CLECs with access to existing wiring on MDU properties.

- The Commission should require ILECs to reconfigure MDU wiring, at the request of a CLEC or the MDU owner, to a single point of interconnection ("SPOI") and to make the resulting on-property network available as a UNE.

- There is no need to extend Section 224 to rights-of-way ("ROW") or easements on private property, which would, in any event, raise a host of legal and practical problems.

- The FCC should not interfere with state law determinations of whether utilities "own or control" in-building conduit or riser that they use in MDUs.

- The Commission lacks jurisdiction to mandate access to MDU properties and any attempt to do so would result in an unconstitutional taking of private property. The establishment of a federal mandatory access right also should be rejected because it would undermine pro-competitive private contracts.

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[2] OpTel provides voice, video, and Internet access services exclusively to residential MDUs. Thus, for purposes of this pleading it's comments are directed primarily at the impact of the proposed rule changes on residential MDUs, although it recognizes that the issues raised in this proceeding apply also in the context of commercial multi-tenant environments ("MTEs").

DISCUSSION

I. ILEC Refusals To Provide Access To On-Property Wiring Are The Primary Barriers To Entry In The Residential MDU Telecommunications Market.

The Commission's purpose in the NPRM is to open up access to the "last hundred feet" in MDUs to help ensure that customers have access to multiple telecommunications providers. Unfortunately, the focus of the NPRM appears to be on a perceived unwillingness of MDU owners to permit access by multiple service providers. At least in the residential markets, property owners are not, in fact, a significant barrier to competition.

OpTel serves exclusively residential MDU properties and, as a result, it has an abundance of experience negotiating for MDU access rights. Substantially all of the MDUs that OpTel serves are campus-style or garden-style complexes. OpTel enters into service agreements with MDU property owners and ownership associations to provide services to MDU residents. In the vast majority of cases, OpTel brings its telephone services to MDUs at the request of the MDU owners, normally because of their dissatisfaction with the quality of service provided by the ILEC. In other cases MDU owners are seeking to offer the choice of a less expensive telephone service as an incentive to potential tenants.[3] Indeed, MDU residents today regard the availability of high-quality, low-cost cable and communications services to be one of the most significant amenities that an MDU can offer.

The most significant barrier to entry in the residential MDU telecommunications markets is a lack of access to on-property networks created, controlled, and configured by the ILECs. For example, BellSouth designs MDU networks so that it can control the customer at the BellSouth switch, obviating the need to dispatch a service crew for most calls and also effectively foreclosing access by a competitor that does not wish to collocate at the BellSouth switch. BellSouth's position is that the demarcation point for

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[3] According to OpTel's market analysis, OpTel's retail rates for local exchange services are approximately 10%-25% lower than the ILEC's rates for the same services in San Francisco, Los Angeles, San Diego, Houston, Dallas, and Phoenix.

each unit in an MDU is at the first jack in each individual unit. Collocation at the ILEC central office, however, is expensive and inefficient, requiring a CLEC to buy loops from the central office rather than use its own facilities.[4]

The only other alternative for a CLEC seeking to provide residential service is to install an entirely redundant and duplicative system on the MDU property. This entails substantial excavation (often in parking lots, through mature landscaping, or through recreational facilities such as tennis courts and swimming pool areas), wall and conduit opening, and rewiring to overbuild facilities throughout the property and to each unit. Not only is such overbuilding cost prohibitive, often infeasible and always disruptive, it simply is not an acceptable approach for many property owners.

Efforts to break the barrier to entry at MDUs by compelling property owners to suffer such an invasion miss the mark. Overbuilding on-property network involves an inefficient use of CLEC resources. Once a CLEC overbuilds the existing network, either the CLEC's network or the ILEC's network will remain on the property unused. Further, since every new competitor presumably would also have to overbuild the entire MDU complex to provide service, the result would be massive disruption to the properly only to run numerous superfluous wires.[5]

The Commission should instead focus its efforts on opening up access to the existing wiring on MDU properties. If CLECs were able to interconnect efficiently with the property wiring already in place, service changes could be executed by a simple cross-connect at a neutral lock-box on or near the property. MDU owners would not be forced to suffer multiple overbuilders, residents would not be inconvenienced by the

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[4] Other ILECs use other configurations to the same end. US WEST, for instance, often uses several points of entry onto a single property with multiple structures, thus requiring CLECs to interconnect at numerous demarcation points. Similarly, Pacific Bell uses multiple demarcation points on many properties and it has refused to reconfigure wiring on those properties to permit competitive access. Whatever the precise configuration, however, the establishment of demarcation points by the ILECs in order to raise the cost of entry has operated as a barrier to competition.

[5] This assumes that in-building conduit could physically accommodate more than only one or two competitors, which, in many cases, it cannot.

construction of superfluous facilities, and the Commission would not be put in the position of testing the bounds of its statutory authority.

II. The Commission Should Require ILECs to Offer MDU Property Wiring As A UNE Under Section 251.

The Commission has asked whether competition on MDU properties may be enhanced by treating inter-building cable and premises wiring (the "on-property network") owned or controlled by an ILEC as an unbundled network element under Section 251(c)(3).[6] As OpTel has noted in other contexts, the unbundling of MDU on-property network as a UNE would be the single fastest way for the Commission to promote immediate competition in the residential MDU telecommunications markets.[7] Further, the unbundling of on-property networks would obviate the need for the more drastic measures proposed in the NPRM.

To successfully unbundled MDU networks, two separate but related actions will be required. First, the Commission should amend its Part 68 rules to require ILECs to establish a single demarcation point in MDUs at the minimum point of entry ("MPOE") onto the premises. Second, ILECs should be required to make sub-loop elements on the property side of the demarcation point available to requesting carriers as a UNE.

A. Part 68 Should Be Revised To Require The Establishment Of A Single Point Of Interconnection On MDU Properties.

The current part 68 rules were developed to foster competition in the provision of customer premises equipment; they were not designed to foster local exchange competition.[8] As a result, the current Part 68 rules contain "loopholes" that allow ILECs to continue to wire MDU properties to multiple, inaccessible demarcation points in

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[6] NPRM ¶ 51.

[7] See Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd 24012 (1998) (OpTel supports the tentative conclusion that ILECs should be required to provide sub-loop unbundling); Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98, Comments of OpTel (filed May 26, 1999); Conditions Proposed By SBC Communications Inc. and Ameritech Corporation for their Pending Application to Transfer Control, CC Docket No. 98-141 (filed July 13, 1999).

[8] Section 68.3 of the Commission's rules defines the demarcation point between "telephone company communications facilities and terminal equipment, protective apparatus or wiring at a subscriber's premises."

order to stifle facilities-based competition and to deny requesting CLECs access to inter-building cabling and premises wiring.

Under Section 68.3, the MPOE is defined in accordance with each ILEC's "reasonable and non-discriminatory operating practices." In MDU networks existing as of August 13, 1990, the demarcation point or points on the property are determined solely by the ILEC's operating practices.[9] In MDU networks installed or rebuilt after that date, the ILEC may adopt the practice of placing the demarcation point at the MPOE but, again, the ILEC is permitted to define the MPOE in accordance with its standard operating practices.[10]

The net result of the rule is that ILECs have wide latitude to establish the demarcation point or points on MDU properties and, even where the demarcation point is at one or more MPOEs, the ILEC generally may determine the location of the MPOE(s). The only qualification is that the ILEC's operating practices must be "reasonable and non-discriminatory."[11] That qualification, however, has proven to be of little practical effect. In fact, the ILEC "practice" often is to establish a demarcation point at each building on an MDU campus, or at each floor in each building, or at the first jack in each unit of each building — technically in compliance with Section 68.3, but foreclosing competitive entry on the property.

In order to make interconnection with on-property distribution facilities practical, competitive providers must have the ability to access MDU facilities at a single point on the property, proximate to the property boundary line, and ILECs must be required to provide the means of connection at this single demarcation point. Accordingly, the Commission should require ILECs to establish a single demarcation point in MDUs at the MPOE, which should normally be the closest practical and

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[9] 47 C.F.R. § 68.3(b)(1).

[10] 47 C.F.R. § 68.3(b)(2).

[11] As the Commission later clarified, the standard operating practices to which Section 68.3(b) refers are those practices in effect on August 13, 1990. Review of Sections 68.104 and 68.213, 12 FCC Rcd 11897, 11915 (1997).

accessible point to where the telephone company's wire crosses the property line.[12] In the multi-unit environment, a network interface device ("NID") required to interconnect the customer inside wiring to the telephone company network should be accessible to all carriers and located at the demarcation point. Thus, for each property there should exist a single point of interconnection ("SPOI") to which all carriers could bring their loop facilities.

Finally, to make this rule effective, it should not apply only to new and remodeled buildings, but to all MDU installations. In buildings at which the ILEC maintains multiple demarcation points or otherwise has installed a network that does not comply with these rules, the ILEC should be required to reconfigure its wiring, without unreasonable delay, upon *bona fide* request by a CLEC seeking access to the premises or the MDU owner seeking to attract new competitors to the property.[13]

By establishing an SPOI at an MPOE, and providing that all carriers must be given access to the NID so that a change in service providers by any resident on the property can be effectuated by a single cross-connect at the NID, the FCC would help to make competitive local exchange service a reality in the residential MDU environment. MDU on-property networks then would be configured to allow competitive entry. That, however, is only the first step. Based on past ILEC conduct, there is no reason to believe that, absent a Commission mandate, the ILECs would actually permit CLECs to interconnect at the SPOI.[14] The Commission should, therefore, require ILECs to make the wiring owned or controlled by the ILEC on the property-side of the MPOE available as a UNE.

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[12] For single building MDUs, this generally will be at the utility closet on the basement or first floor; for multi-building properties, this generally will be in a utility closet or other structure closest to where trunk lines cross the property boundary line.

[13] The Commission should presume that any reconfiguration requiring more than 90 days is unreasonable.

[14] Indeed, in California, Pacific Bell was ordered by state authorities to reconfigure on-property wiring to promote competition. Pacific Bell has refused to do so and OpTel has been forced to litigate the issue. See, e.g., TVMAX Telecommunications, Inc. d/b/a/ OpTel, v Pacific Bell, Complaint (filed Apr. 29, 1999) (Attachment 1).

B. ILECs Should Make On-Property Wiring That They Own Or Control Available As A UNE.

The Commission has asked whether a modification of the Part 68 rules, in combination with the imposition of an access obligation on MDU owners, would "constitute an effective alternative to requiring access to inside wiring as an unbundled network element."[15] It would not. Indeed, as discussed below, OpTel believes that efforts by the Commission to reach out and regulate MDU owners are fraught with legal problems, unwise as a policy matter, and unnecessary. Instead, the Commission should, in combination with the above-described modifications to its Part 68 rules, require unbundling of the on-property network, including the wiring dedicated to individual residential units, and the NID at which those lines terminate.

1. There is no technical barrier to unbundling on-property network.

The Commission has concluded that, "successful interconnection or access to an unbundled element at a particular point in a network, using particular facilities, is substantial evidence that interconnection or access is technically feasible at that point."[16] In the case of MDU on-property distribution facilities, these facilities have been, and are being, made available to OpTel and other CLECs in some markets where the ILEC has been directed or compelled to do so.[17]

For example, in selected markets, and at the behest of OpTel, SBC has reconfigured dozens of MDU properties to a single point of interconnection. Indeed, SBC's Texas state tariff includes numerous provisions relating to the pricing, terms, and conditions of reconfiguring MDU properties to a single point of interconnection and permitted competitive access at that point.[18] Given the relatively simple process involved in running a connecting line between the existing demarcation points on the

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15 NPRM ¶ 66.

16 First Interconnection Order, 11 FCC Rcd 15499, 15606 (1996).

17 In the few markets in which ILECs have agreed to provide access to on-property wiring, they do so only if the CLEC will pay exorbitant monthly rates approaching the rate for an entire loop facility. See, e.g., Letter from Pam O'Connell, Account Manager for US WEST, to Mark Buck, OpTel (July 15, 1999) (Attachment 2).

18 See SBC "General Exchange Tariff" §§ 14, 15 (Attachment 3).

property and a new single point of interconnection, it is inconceivable that reconfiguration on a broader scale would yield novel technical issues.

2. Sub-loop unbundling of the on-property network would promote the development of residential telephone competition.

By allowing CLECs to obtain on-property distribution facilities on an unbundled basis, the Commission would encourage competitive facilities-based build-out to the property line and thereby ease collocation congestion at ILEC central offices. In turn, CLECs could bring their own networks close to end-users, provide all of their own services and network intelligence, and compete not only on price, but also on quality, reliability, and service.

Further, the resistance of MDU owners to the continual rewiring of their properties by multiple CLECs would be eased by the unbundling of on-property networks. If CLECs were able to cross-connect at an SPOI at or near the property line, MDU owners could allow multiple providers to compete at their property without subjecting residents to repeated disruptions and construction for each new CLEC providing service at the property. Indeed, because it may be possible for CLECs to site their equipment off of the property to be served, the concerns of the MDU owners may be rendered moot and residents would be able to use any service provider that would bring its network to the SPOI.[19]

III. Efforts to Mandate CLEC Access To MDUs Under Section 224 Would Be Unlawful, Unconstitutional, And Unwise.

As set forth above, the Commission could address CLEC access issues within its current authority to establish telephone demarcation point rules and to identify UNEs under Section 251. It need not, therefore, extend its interpretation of Section 224 as

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[19] What's good for the goose is, of course, good for the gander. OpTel regularly installs wiring on new properties and, in every case, it constructs the on-property network so that it terminates at an SPOI, and access at the SPOI is available to all competitors, including the ILEC.

proposed in the NPRM in order to achieve the pro-competitive ends sought. Indeed, if it were to do so, it would raise a host of legal, policy, and practical concerns.[20]

A. The Interpretation Posited In The NPRM Is Legally Infirm.

Section 224 defines the rights of cable operators and telecommunications carriers *vis-à-vis* utilities. There is no provision in the statute regarding the rights of third party property owners over whose property a utility line may pass. Nor is there any suggestion in the legislative history that the statute was meant to deal with those circumstances. Yet, by extending its interpretation of Section 224 to include utility easements and ROWs over private property, the Commission necessarily will impinge upon the rights of those third party property owners.

1. The interpretation of Section 224 proposed in the NPRM would result in an unconstitutional taking of private property.

By requiring MDU owners to open their property to any and all CLECs and cable operators solely because a utility has access to the property, perhaps for completely different services given that access does not turn on whether the utility is providing telecommunications services to the property, the FCC will be depriving MDU owners of a fundamental property right — the right to exclude others.[21] As such, the interpretation proposed in the NPRM would result in an unconstitutional taking of private property.

To begin with, extending Section 224 to encompass easements and ROWs on private property clearly would result in a "taking" of property for Fifth Amendment purposes. There is some suggestion in the NPRM that no taking would result because, as the Commission found with respect to its OTARD rules, the property owner would

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[20] It should be noted that one premise of the proposed interpretation of Section 224 is that it applies to wireless facilities. See NPRM ¶ 36 & n.79. That aspect of the Commission's pole attachment rules, however, has been appealed, Gulf Power Co., *et al.* v. FCC, File No. 98-6222 (11th Cir. 1998), and, as a prudential matter, it should not be the basis for a further extension of the Commission's regulatory reach. Indeed, the very constitutionality of Section 224 is on appeal in the same circuit.

[21] E.g., Nixon v. United States, 978 F.2d 1269, 1284 (D.C. Cir. 1992).

be suffering nothing more than an extension of an existing use.[22] The analogy to the Commission's OTARD rules is, however, deeply flawed.

In OTARD, the question was whether, once a landlord grants a tenant the right to use a particular premises, the landlord could limit the type of facilities that the tenant could attach to the property within the leased premises. The question posed by the NPRM, on the other hand, is whether, once a landlord grants a utility the right to run a line through a specific space, it has granted that utility the right to, and indeed the utility is required to, rent that space to other users. Nothing in the OTARD proceeding supports the proposition that no "taking" would occur if the Commission's rules required residents to sub-lease antenna space to third parties.

Further, the taking of MDU owners' property that would result would go uncompensated. Section 224 provides for compensation to utilities when they are compelled to open their poles, conduits, and ROWs to cable operators or telecommunications carriers. The compensation flows from the cable operator or telecommunications carrier to the utility. There is no provision in the statute for compensating underlying property owners.

Thus, the proposed interpretation of Section 224 would require MDU owners to suffer any number of third parties to access their property and they would receive no compensation for the intrusion. The Constitution does not permit such heavy-handed government action.

2. The proposed interpretation of Section 224 would overstep the bounds of the Commission's statutory authority.

Two principles should guide the Commission's interpretation of its statutory authority. First, absent a clear directive from Congress, the Commission should avoid constructions that raise significant constitutional questions.[23] Second, as a matter of

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[22] NPRM ¶ 47 & n.106 (citing OTARD Second Report & Order, 13 FCC Rcd 23874, 23882-85 (1998)).

[23] E.g., See Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1331 (D.C. Cir. 1994).

comity and federalism, and consistent with Section 152 of the Communications Act, the Commission should not intrude upon questions of state law.[24] The interpretation of Section 224 proposed in the NPRM would violate both of these principles.

As set forth above, a federal rule requiring property owners who make space available for utilities to allow cable operators and telecommunications carriers to occupy the same space would raise a significant Takings Clause question. That construction of Section 224 cannot be defended as clearly-contemplated by Congress. As the Commission itself acknowledges in the NPRM, the intent of the framers of Section 224 was to reach utility below-ground conduits, *i.e.*, the functional equivalent of utility above-ground poles.[25] This has traditionally been the understanding of the Commission and it is consistent with the fact that, for the most part, utilities do not own the risers on private MDU properties through which their facilities run.

Moreover, the interpretation of Section 224 posited in the NPRM, which may require the Commission to establish federal rules or policies regarding the ownership or control of riser space on an MDU properties,[26] would interject the Commission into questions that are exclusively within the domain of state law. There is no authority for such an extension of FCC jurisdiction. To the contrary, Section 224 does not even apply to pole attachment agreements in states that elect to regulate them. It would be odd indeed if Congress intended for the FCC to defer to states on the rates, terms, and conditions of pole attachments — which are the very essence of the statute — but intended in the same section, *sub silencio*, to give the FCC authority to supplant state property law in determining which easements and ROWs on private property actually are owned or controlled by utilities.

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24 See AT & T v. Iowa Utils. Bd., 119 S. Ct. 721, 730 n.6 (1999); Texas Office of Public Utility Counsel v. FCC, No. 97-60421 (5th Cir. July 30, 1999).

25 See NPRM ¶ 44 (Section 224 intended to regulate access to "underground reinforced passages"); cf. 47 C.F.R. § 1.1402(i) (defining conduit as pipe placed in the ground). This also explains the fact that there is no provision in Section 224 to compensate underlying property owners for any taking of their property.

26 NPRM ¶¶ 45, 47.

More importantly, the fact that Section 224, the very basis upon which the Commission is proposing to assert jurisdiction in this area, does not apply in any state that chooses to regulate "pole attachments" demonstrates that the Commission's construction is of the statute is impermissible. Presumably, if Congress had intended the FCC to regulate MDU property access under Section 224, it would have required states to demonstrate that they, too, regulate MDU access in some fashion in order to escape federal regulation — the statute does not.

Finally, and in any event, the suggestion in the NPRM that utilities should be regarded as owning or controlling easements or ROWs that they occupy on private property should be abandoned as unworkable. Property owners typically do not cede control of a conduit space when they allow a given entity access to it. By retaining "ownership and control," the property owner may limit access to the property, safeguard residents' homes and persons, and protect against unreasonable or invasive intrusions. By contrast, if the Commission were to establish a federal regulatory presumption that utilities control conduit that they occupy on private property, there would be no end to the uncertainty and litigation that would follow.

For example, if two utilities use the same riser in an MDU, which of the two would be deemed to "control" the conduit for purposes of Section 224? Which may charge third parties for access? May a utility charge other utilities for access? Would the property owner have any continuing ownership interest in the space? If not, would the property owner also lose its ability to charge utilities — the same utilities that cause the space to be confiscated under Section 224 — for access? Would there be ways to avoid the confiscation? Could the property owner make a bulk deal for utility service and then distribute the service over the property on its own lines?

There are no good answers to these questions under the statute because the interpretation of Section 224 posited in the NPRM goes beyond the bounds of the statute. This should come as no surprise given that the interpretation has been, from the first, an effort to fit a square peg into a round hole. Section 224 was enacted to allow

cable operators and telecommunications carriers to have access to utility poles and conduits. In the NPRM, however, the Commission is asking whether the statute may be used to compel MDU owners to open their properties to cable operators and telecommunications carriers. For all of the reasons discussed above, it may not.

B. Expansion Of Section 224 Should Be Rejected On Policy Grounds.

Even if the statute permitted the interpretation offered in the NPRM, the Commission would be unwise to stretch Section 224 into a forced MDU access statute. Because Section 224 benefits both cable operators and telecommunications carriers, the interpretation of Section 224 as a mandatory access law for telecommunications carriers would result, also, in a federal, nationwide mandatory-access law for cable operators. Such a result would undermine the Commission's recent efforts to foster competition in the MVPD market and nullify the Commission's own cable inside wiring rules.

1. The establishment of a federal mandatory access law for cable operators would dramatically inhibit the development of competition in the local MVPD markets.

Currently, about a dozen states have "mandatory access" laws that allow cable operators to force their way onto MDU properties. As has been discussed in countless pleadings in the Cable Services Bureau's "inside wiring" rulemaking proceeding, CS Docket No. 95-184, mandatory access laws discourage competition.

New entrants into the MVPD market often use, and many times require, exclusive contracts with MDU owners for the provision of MVPD services. For new entrants such as OpTel, exclusive arrangements help to justify and finance the significant investment required in network facilities needed to provide service to residents. In turn, through exclusive arrangements, MDU residents can wield their collective buying power to demand better services at lower prices.[27] Mandatory access laws make it impossible for service providers to negotiate exclusive arrangements and

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[27] In 1998, Professor Michael D. Whinston prepared a report on the pro-competitive effects of exclusive contracts between MVPDs and MDUs. (Attachment 4).

they make it impossible for MDU residents to wield their collective buying power. Therefore, and based on the extensive record developed in the "inside wiring" proceeding, the Commission recently declined to adopt a federal MVPD mandatory access regime.

An interpretation of Section 224 as an MDU forced access statute would reverse that course and nullify pro-competitive exclusive agreements that allow new entrants to compete with the incumbent franchised cable operators. Ironically, the posited interpretation of Section 224 would leave intact exclusive contracts held by franchised cable operators because Section 224 does not benefit non-franchised MVPDs, *i.e.*, new entrants in the MVPD markets would gain no access right under Section 224. Thus, although the proposed expansion of Section 224 rights outlined in the NPRM is intended to promote competition in the telecommunications markets, it likely would have the opposite effect in the MVPD markets.

2. The proposed interpretation of Section 224 would undermine the Commission's own recently-adopted cable inside wiring rules.

Not only would the interpretation of Section 224 as a forced access statute nullify the exclusive contracts of non-franchised MVPDs, it would undermine the Commission's own cable inside wiring rules.

Following an extremely thorough analysis of the MVPD market, the Commission in late 1997 adopted a set of procedures governing the disposition of inside wiring upon a change of service provider at an MDU — either building-by-building or unit-by-unit. In essence, the cable inside wiring rules require MVPDs to remove, sell, or abandon MDU inside wiring once a new MVPD has been selected to provide service. Importantly, however, the Commission's detailed inside wiring rules do not apply to franchised cable operators where the cable operator has a "right to remain on the premises."[28]

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[28] 47 C.F.R. § 76.804.

The interpretation of Section 224 posited in the NPRM would invite cable operators to argue that they have a right to remain on any premises served by a utility subject to Section 224. If that argument were successful, the Commission's finely crafted inside wiring rules would be rendered a virtual nullity and, even if eventually unsuccessful, the argument would provide franchised cable operators with another excuse for resistance when a competitive MVPD seeks to invoke the Commission's inside wiring rules. Nothing in the NPRM suggests a rationale for undermining Commission rules that were years in the making and which now are beginning to have a pro-competitive effect on the MVPD market.

IV. The Commission Should Not Attempt To Mandate Access To Facilities Controlled By MDU Owners.

Failing to use Section 224 as a mandatory access statute, the Commission asks whether it may directly compel MDU owners to open their properties to multiple service providers. Again, for both legal and policy reasons, OpTel opposes any suggestion that it do so.

First, as set forth above, mandatory access, although intuitively appealing, actually may be anti-competitive in many circumstances. By making it impossible for service providers to negotiate exclusive arrangements, mandatory access rules deny subscribers the right to exercise collective buying power and impair the ability of new entrants to raise capital necessary for network build-out.[29] For these reasons, OpTel opposes the imposition of mandatory access requirements on MDU owners.[30]

Second, the NPRM asks whether the Commission's ancillary authority under Section 4(i) of the Communications Act, in combination with its authority under Title I to regulate wiring used in interstate commerce, is sufficient to establish an MDU access

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[29] Inside Wiring, 13 FCC Rcd at 3742.

[30] Although the NPRM is phrased in terms of mandatory access for "providers of telecommunications services," it is not clear that any final rule adopted could be that easily cabined.

requirement.[31] It is not. Although the Commission's power under Section 4(i) to regulate services that otherwise are within its jurisdiction is broad, Section 4(i) is not an independent grant of authority to regulate outside of the bounds of the Communications Act. If it were, after all, the Commission's authority would be unlimited, which would contravene a basic principle of administrative law.[32]

The cross-reference to the Commission's authority under Title I is no more availing. The element still lacking in the statutory mix is some provision granting the FCC jurisdiction over MDU owners. That is, putting aside Section 152(b), the Commission unquestionably has jurisdiction over wiring that is used in interstate communications, and the Commission may use its Section 4(i) authority to regulate such wiring and those who own and control it. The Commission does not, however, have jurisdiction over property owners who happen to allow wiring to pass over or through their property. The Commission might as well assert jurisdiction over MDU owners based on the fact that tenants install telephones in their units.

Finally, for the many of the same reasons discussed above, the adoption by the Commission of a rule requiring MDU owners to open their property to multiple telecommunications providers would result in an unconstitutional taking of private property. "[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our Constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention."[33]

Contrary to the suggestion in the NPRM, the proposed mandatory access rule is not analogous to the Commission's OTARD rule. Whereas the OTARD rules address limits on how a tenant may use property already leased to the tenant, the proposed mandatory access rule would require property owners to open their property to third

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31 NPRM ¶¶ 56-57.

32 E.g., Lyng v. Payne, 476 U.S. 926, 937 (1986) ("an agency's power is no greater than that delegated to it by Congress").

parties with whom they have no prior relationship. Accordingly, the proposed MDU access rule would constitute a *per se* taking under the Fifth Amendment.[34] Absent express statutory authority, the Commission may not effectuate such a taking.[35]

V. The Commission Should Not Attempt To Regulate Private Agreements Between MDU Owners And Telecommunications Carriers.

In the NPRM, the Commission asks a number of questions regarding private agreements between MDU owners and telecommunications carriers.[36] OpTel opposes any Commission attempt to regulate these agreements. For all of the trouble that the Commission has had promoting competition in the MVPD and telecommunications markets, there is one market that is extremely competitive — the residential real estate market. MDU owners today compete to provide better or less-expensive video and telecommunications services to their tenants in order to survive in that market.

MDU owners and CLECs sometimes enter into arrangements that involve an exclusive marketing arrangement. There is nothing anti-competitive about these arrangements and nothing calling for federal regulatory intervention. Indeed, to the extent that the Commission attempts to regulate these private agreements, it is inevitable that it will distort the marketplace in unintended ways. For example, any rule abrogating existing exclusive marketing arrangements would be unfair to the contracting parties and may undermine concessions given to MDU residents (*e.g.*, lower rates) in exchange for marketing services at the MDU.

Thus, at least with regard to carriers that lack market power, and certainly as to contracts that do not restrict the access of other carriers, the Commission should not attempt to regulate private agreements between MDU owners and telecommunications carriers.

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33 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

34 E.g., Gulf Power Co. v. FCC, 998 F. Supp. 1386, 1395 (N.D. Fla. 1998) (Section 224 a *per se* taking), appeal pending.

35 Bell Atlantic, 24 F.3d at 1441.

36 NPRM ¶¶ 61-64 & n.162.

CONCLUSION

The Commission should identify MDU on-property networks as UNEs and abandon any proposal that would impinge on the property interests of MDU owners.

Respectfully submitted,

OPTEL, INC.

/s/ W. Kenneth Ferree
W. Kenneth Ferree

GOLDBERG, GODLES, WIENER & WRIGHT
1229 Nineteenth Street, NW
Washington, DC 20036
(202) 429-4900
Its Attorneys

Counsel:

Michael E. Katzenstein
Vice-President and General Counsel
OpTel, Inc.
1111 W. Mockingbird Lane
Dallas, TX 75247

August 27, 1999

Attachment 1
(TVMAX Telecommunications, Inc. d/b/a/ OpTel, v Pacific Bell)

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

TVMAX Telecommunications, Inc. d/b/a OpTel, OpTel (California) Telecom, Inc. (U-5797-C), Satellite Management Co., William G. Sommerville, and Clarence Conzelman,	)	
Complainants,	)	
v.	)	Case No. _____
Pacific Bell (U-1001-C) and GTE California, Inc. (U-1002-C),	)	
Defendants.	)	

COMPLAINT

GOODIN, MACBRIDE, SQUERI, RITCHIE & DAY, LLP
John L. Clark
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 765-8443
Facsimile: (415) 398-4321

Attorneys for Complainants

Date: April 29, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

TVMAX Telecommunications, Inc. d/b/a OpTel, OpTel (California) Telecom, Inc. (U-5797-C), Satellite Management Co., William G. Sommerville, and Clarence Conzelman,	)	
Complainants,	)	
v.	)	Case No. _____
Pacific Bell (U-1001-C) and GTE California Incorporated (U-1002-C),	)	
Defendants.	)	

COMPLAINT

Pursuant to California Public Utilities Code § 1702, TVMAX Telecommunications, Inc. d/b/a OpTel ("TVMAX"), OpTel (California) Telecom, Inc. ("OpTel"), Satellite Management Co. ("SMC"), William G. Sommerville ("Sommerville"), and Clarence Conzelman ("Conzelman"), collectively referred to herein as "complainants," respectfully make the following complaint against Pacific Bell ("Pacific") and GTE California Incorporated ("GTEC"), collectively referred to herein as "defendants":

I. INTRODUCTION.

This complaint seeks an injunction requiring the defendants to reconfigure the facilities that they currently use to serve certain multiple dwelling unit ("MDU") properties in

California in order to allow other carriers the opportunity to compete with them in the provision of telecommunications services to residents of those properties on a reasonable and nondiscriminatory basis that is free of dependence on, and potential manipulation by, the defendants.

TVMAX, through its affiliate, OpTel, specializes exclusively in the provision of high-quality, state-of-the-art telecommunications and enhanced services to MDU residents. TVMAX and OpTel share a common interest with MDU property owners in bringing true choices in facilities-based telecommunications services to MDU residents -- choices that are competitively distinguishable from the offerings of the ILECs. In furtherance of this joint purpose, TVMAX has entered into agreements with a number of MDU property owners in California for the installation, operation, and maintenance of the telecommunications facilities that are necessary to enable OpTel, and other competitive carriers to provide their services to MDU residents. Sommerville and Conzelman are two such property owners. SMC represents their interests and those of a number of other property owners, both as an agent and a property manager.

The MDU properties owned by Sommerville, Conzelman, and other property owners are of various configurations, ranging from single high rise buildings to multiple buildings on campus-style settings located on acres of land. In order to serve these properties, OpTel brings its microwave or other distribution facilities to a suitable demarcation point at or near the property line. From that point, OpTel's services are delivered to residents over inter- or intra-building cable and other inside wiring.

However, OpTel has found that in numerous instances, the existing cable and wiring at MDU complexes does not all terminate at a single demarcation point, but, instead,

terminates at multiple, disparate demarcation points established by the incumbent local exchange carrier ("ILEC") currently serving the property. Due to the existence of mature landscaping and other improvements such as swimming pools, parking lots, patios, and other structures, along with other factors, it usually is not feasible for OpTel or TVMAX to overbuild the facilities that the ILECs use to serve these properties through multiple demarcation points. Nor, for the same reasons, would it typically be feasible for other rational facility-based competitors to do so, either. As a consequence, it is critical in such cases for OpTel or TVMAX to be able to reconfigure the existing wiring at the properties to terminate at a single demarcation point.

Reconfiguring property wiring to establish a single demarcation point requires the cooperation of the ILEC. Not only must the ILEC's entrance facilities be rearranged to terminate at the new demarcation point, but there usually is a need for the ILEC to transfer to the property owner a portion of the inter- or intra-building cable previously used to serve the multiple demarcation points so that the cable can be used on a nondiscriminatory basis by any carrier desiring to serve property residents.

TVMAX has obtained written authorizations from Sommerville, Conzelman, and other property owners to seek demarcation point reconfigurations and stands ready to advance the reasonable costs thereof or to perform all necessary work itself, if doing so would be more time-and cost-effective. However, TVMAX has been completely unsuccessful in procuring the cooperation of the defendants with respect to the reconfiguration of demarcation points at any MDU properties in California. As a result, OpTel has been and continues to be denied the ability to offer its services to a large portion of its target market in California. What is more, the defendants' refusals to comply with their obligations have placed Sommerville, Conzelman, and other property owners at competitive disadvantage by depriving them of the opportunity to

offer residents and potential residents of their properties true alternatives for facilities-based telecommunications and related services. In addition, because TVMAX, on several occasions, had been led by both Pacific and GTEC to believe either that it would be unnecessary to submit requests to establish new demarcation points or that they would comply with such requests on a timely basis, TVMAX has missed commitments that it has made to property owners and is in danger of missing others. This has caused both OpTel and TVMAX to suffer damage to their reputations and good will as the result of their inability to deliver promised services. Moreover, as a result of these delays, in some cases TVMAX is liable for liquidated damages and in other cases is threatened with the expiration of its rights under its agreements.

The defendants have no reason for refusing to honor the complainants' requests other than to impede competition. The defendants' conduct is anti-competitive, discriminatory, violates their tariffs, and is specifically proscribed by existing Commission policy. By this complaint, the complainants are seeking injunctive relief compelling Pacific and GTEC to respond on a timely basis to requests for reconfiguration of demarcation points at MDU complexes either by performing the necessary work as requested or authorizing TVMAX and OpTel to do so. In addition, complainants are requesting that the Commission provide for appropriate penalties to be imposed on the defendants for each day of any unreasonable delay in meeting requests for wiring reconfigurations. Finally, the complainants seek an order requiring the defendants to pay reparations to complainants and other affected property owners for the defendants' respective failures to timely complete demarcation point changes, in the form of refunds of, or credits against, any charges for completing such changes in amounts equal to the full amounts of such charges.

II. COMMUNICATIONS

1. All pleadings, correspondence, and other communications concerning this complaint should be directed to complainants' attorneys as follows:

John L. Clark
GOODIN, MACBRIDE, SQUERI, RITCHIE & DAY, LLP
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 765-8443
Facsimile: (415) 398-4321

III. JURISDICTION OF THE COMMISSION

2. The Commission is vested with broad authority under sections 701, 1702, and 1707 of the Public Utilities Code to redress any violation of Commission decisions or applicable provisions of state law. Under sections 1702 and 1707, the Commission has jurisdiction over complaints by individuals and public utilities that set forth "any act or thing done or omitted to be done by any public utility in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission." Cal. Pub. Util. Code § 1702.

IV. THE PARTIES

3. Complainant TVMAX Telecommunications, Inc. d/b/a OpTel is a Delaware corporation and is authorized to conduct business within the State of California. Its address and telephone number are as follows:

TVMAX Telecommunications, Inc.
c/o OpTel, Inc.
Attn: Michael Katzenstein
1111 W. Mockingbird Lane, 10th Floor
Dallas, TX 75247
Tel: (214) 634-3824

4. Complainant OpTel (California) Telecom, Inc. is a Delaware corporation and is authorized by the Commission to provide local, intraLATA, and interLATA telecommunications services within California, specifically including the service territories of Pacific and GTEC. Its address and telephone number are as follows:

OpTel (California) Telecom, Inc.
Attn: Michael Katzenstein
1111 West Mockingbird Lane
Dallas, Texas 75247
Tel: 214-634-3824

5. TVMAX and OpTel are under common ownership.

6. Complainant Satellite Management Co. is a California corporation. Its address and telephone number are as follows:

Satellite Management Co.
1010 East Chestnut
Santa Ana, CA 92701
Tel: (714) 558-2411

7. Complainants Sommerville and Conzelman are both individuals. Their addresses and telephone numbers are as follows:

William G. Sommerville
c/o Satellite Management Co.
1010 East Chestnut
Santa Ana, CA 92701
Tel: (714) 558-2411

Clarence L. Conzelman
c/o Satellite Management Co.
1010 East Chestnut
Santa Ana, CA 92701
Tel: (714) 558-2411

8. Defendant Pacific is an incumbent local exchange carrier that provides service to customers in exchanges located throughout the state. Pacific's address and telephone number are as follows:

Pacific Bell
140 New Montgomery Street, Ste. 1819
San Francisco, California 94105
Tel: (415)-542-0373

The name and address of Pacific's registered agent are as follows:

Samuel Novell
21250 Webster Street, Rm. 735A
Oakland, CA 94612

9. Defendant GTEC is an incumbent local exchange carrier that provides service to customers in various exchanges located in portions of northern, central, and southern California. GTEC's address and telephone number are as follows:

GTE California Incorporated
One GTE Place (RC3412)
Thousand Oaks, CA 91362
Tel: (805) 372-7631

The name and address of GTEC's registered agent are as follows:

CT Corporation System
818 West Seventh Street
Los Angeles, CA 90017

10. Joinder of the defendants herein is appropriate because OpTel's complaint as to each of them involves similar issues of fact and identical issues of law and policy.

V. FACTUAL ALLEGATIONS

11. Each of the defendants provides local exchange service to residents of MDU complexes located within their respective service areas.